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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1052

J. FRANK HOGUE,

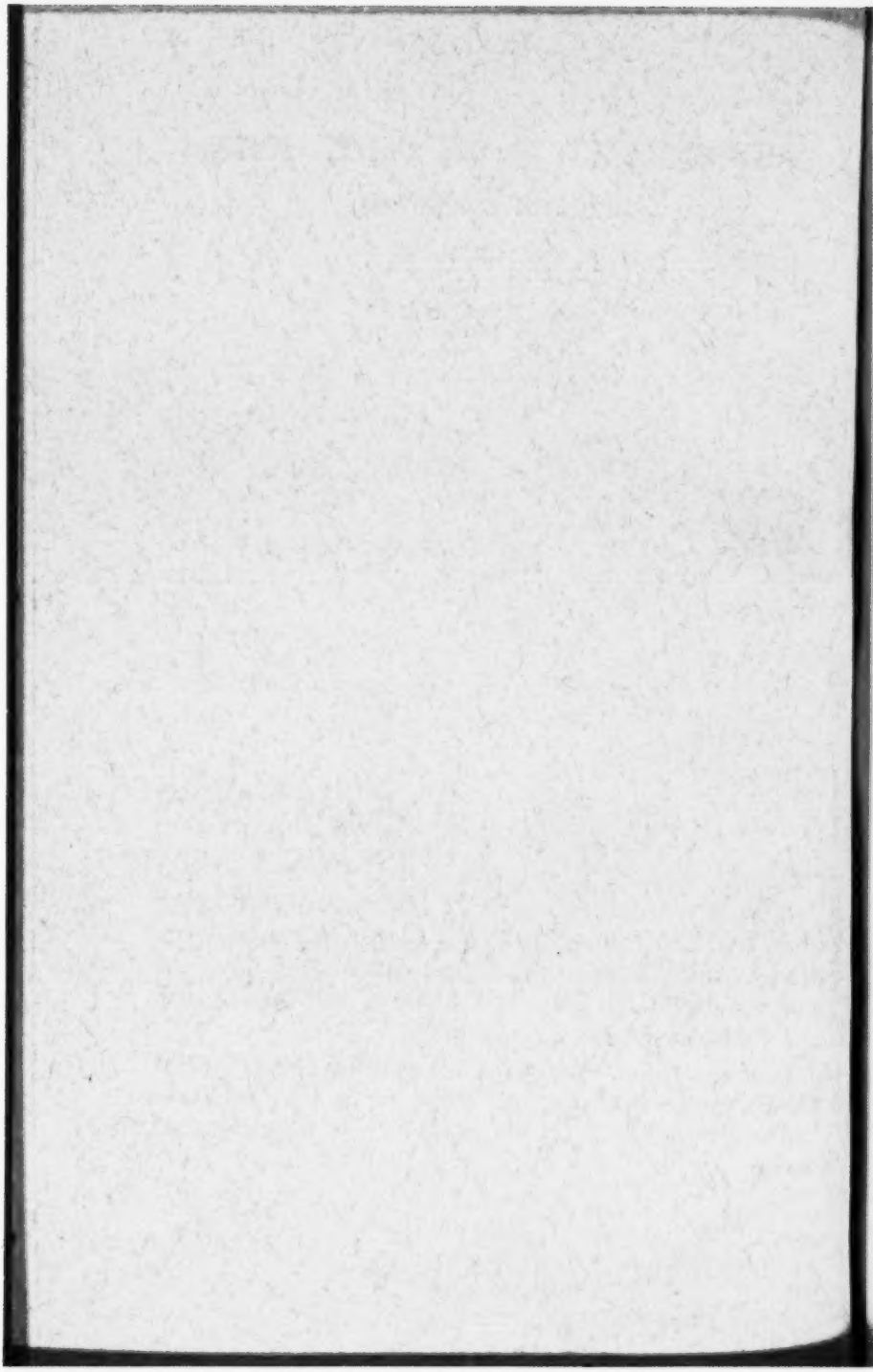
Petitioner,

vs.

CLINTON T. DUFFY, WARDEN, SAN QUENTIN PENITENTIARY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. FRANK HOGUE,
Pro Se.



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J. FRANK HOGUE,

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vs.

CLINTON T. DUFFY, WARDEN, SAN QUENTIN PENITENTIARY.

PETITION FOR A WRIT OF CERTIORARI.

Your petitioner, J. Frank Hogue, respectfully represents to the Court the following:

That he is unlawfully imprisoned in the California State Prison at San Quentin, California, and that he is being held illegally and unlawfully, and that he has successively applied by petition for a writ of habeas corpus, in all of the State courts of the State of California, and that in each court his petition has been denied.

Your petitioner states that the petition for a writ of habeas corpus, filed by your petitioner is fully set forth in the Transcript of Record, pages 1 to 16 inclusive, filed herein.

I.

Your petitioner states that on the 26th day of October, 1940, he filed the aforementioned petition for a writ of habeas corpus in the Superior Court of Marin County, State of California, which was presided over by the Honorable Judge Edward Butler, and that said petition was denied by said Court on the 14th day of November, 1940, without giving petitioner a hearing upon the merits of his case.

II.

Your petitioner states that on the 7th day of December, 1940, he filed the same petition for a writ of habeas corpus with the District Court of Appeals, First Appellate District of the State of California and that on the 11th day of December, 1940, said Court denied said petition without giving petitioner a hearing upon the merits of his case and without rendering an opinion.

III.

That on or about the 10th day of March, 1941, your petitioner filed his petition for a writ of habeas corpus with the Supreme Court of the State of California, and that said Court denied said petition on the 17th day of March, 1941, without giving your petitioner a hearing upon his petition, or the merits of his case and that said court did not render an opinion in his case.

IV.

Your petitioner respectfully shows that having exhausted all his legal remedies in the State courts of the State of California, and there being Federal questions involved in his case, and violations of the State and Federal Constitutions, that he filed his petition for a writ of habeas corpus in the United States District Court, for the Northern Dis-

trict of California, on or about the 15th day of April, 1941, the learned Judge A. F. St. Sure, of said Court rendered the following decision upon said petition:

"In the Southern Division of the United States District Court for the Northern District of California

No. 23463-S

In the Matter of J. FRANK HOGUE, On Habeas Corpus.

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS.

Upon consideration of the petition for writ of habeas corpus filed herein, it appears that said petition should be Denied, and it is So Ordered.

The petitioner is confined at San Quentin under state process. Under such circumstances the law is settled that even where a defendant has exhausted his state remedies the United States District Courts will ordinarily not interfere by habeas corpus, but Will Leave Him to Take His Case Direct to the United States Supreme Court.

Mooney *v.* Holohan, 294 U. S. 103;
Urquhart *v.* Brown, 205 U. S. 179, 181;
Mooney *v.* Holohan, 7 Fed. Supp. 385, 390;
Ex Parte Jefferson, 106 Fed. (2) 471.

Dated: April 19, 1941."

"A. F. ST. SURE,
United States District Judge."

V.

Your petitioner further shows that he then filed notice of appeal from the United States District Court for the Northern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appeal was allowed and perfected, and that on the 9th day of June, 1941, he filed his appeal in the United States Circuit

Court of Appeals for the Ninth Circuit, and that on the 16th day of January, 1942, said Court handed down the following decision in said case:

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 9844

Jan. 16, 1942.

J. FRANK HOGUE,

Appellant,

vs.

CLINTON T. DUFFY, WARDEN, SAN QUENTIN PENITENTIARY,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Before: Garrecht, Haney, and Healy, Circuit Judges

GARRECHT, *Circuit Judge:*

The court below denied Hogue's petition for a writ of habeas corpus and he appeals. The petition alleged that he was in the custody of Duffy, the warden of the California State Prison at San Quentin, California; that he had exhausted the legal remedies afforded by the State of California to secure his release from the penitentiary; that his

imprisonment was violative of the Fifth and Fourteenth Amendments to the Constitution of the United States and, also, that he has been denied the writ of habeas corpus despite the terms of Art. 1, Sec. 9, Cl. 2, of the said Constitution that the statute under which he was convicted provided no maximum term of imprisonment, which term, in this instance, was fixed by the Board of Prison Terms and Paroles of California, in excess of its authority. The petitioner further alleges that he was inducted (in two counts) and pleaded guilty to violation of section 288 of the Penal Code of California; that he was sentenced on May 29, 1935, to imprisonment "for the term prescribed by law," the terms of imprisonment to run concurrently; that on October 8, 1936, one year and three days after entering prison, he was questioned by the California State Board of Prison Terms and Paroles in a meeting at San Quentin and on the following day was notified, in writing, that his term was fixed at twenty years and five years. He contended that the illegality of his restraint consisted of the following:

> "Expiration of lawful sentence and excess punishment in;
>
> "1. That the sentence determined by the Board of Prison Terms and Paroles is a maximum sentence and contrary to the provisions of Section 1168 Penal Code.
>
> "2. That the sentence determined by the Board of Prison Terms and Paroles is ex post facto, it not being provided for in section 1168 Penal Code, nor the judgment and sentence of the court of trial.
>
> "3. That the sentence determined by the Board of Prison Terms and Paroles is a lack of due process of law, is contrary to section 686 Penal Code, and Art. 1, section 13, of the Constitution of California, and amendment 5, sec. 1, and amendment 14, sec. 1, to the Constitution of the United States."

The remainder of the petition was devoted to argument urging issuance of the writ of habeas corpus, and concluded with a prayer therefor.

The court below, in denying the writ, held "THAT EVEN WHERE A DEFENDANT HAS EXHAUSTED HIS STATE REMEDIES, THE UNITED STATES DISTRICT COURTS WILL ORDINARILY NOT INTERFERE BY HABEAS CORPUS, BUT WILL LEAVE HIM TO TAKE HIS CASE DIRECT TO THE UNITED STATES SUPREME COURT."

The Supreme Court of the State of California, the District Court of Appeals and the Superior Courts of the State are empowered to issue writs of habeas corpus in the exercise of their original jurisdiction (Const. Calif., Art. VI, sec. 4, 4b, and 5; 13 Cal. Jur. (par.) 59, p. 284), but if the writ is petitioned for and denied in the lower court, no appeal will lie (*Ex parte Zany*, 164 Cal. 724) and if it is desired to pursue the remedy further, a new application must be made to the higher court (Sec. 1475 Penal Code Calif.; 13 Cal. Jur. (par.) 60, p. 285). The record here discloses that Hogue successively petitioned the Superior Court of the State of California, the District Court of Appeal, and the Supreme Court, and that each, in turn, denied his application for the writ of habeas corpus. Apparently, for it does not appear in the record, no attempt was made by Hogue to secure a review in the Supreme Court of the United States of the order of the State Supreme Court denying his application, but he made the application to the court below, out of which arises this appeal.

In the circumstances, in view of the well settled state of the law in cases such as this, where the state remedies have been exhausted by the applicant, but he has failed to seek review in the Supreme Court of the United States of the action of the highest court of the state, it would be improper for us to discuss the merits of petitioner's case. Directly in point, and authoritative, is *Palmer* v. *McCauley, Warden*, 9 Cir., 103 F. (2d) 300, 301, where we said that "the appropriate way to raise questions involving the validity of a commitment under a state law is by application to the state courts, and if denied by appeal to the Supreme

Court of the United States." See also *Urquhart* v. *Brown*, 205 U. S. 179; *Kramer* v. *State of Nevada*, 9 Cir., 122 F. (2d) 417; *Ex parte Jefferson*, 9 Cir., 106 F. (2d) 471; *Ex parte Penny*, 9 Cir., 103 F. (2d) 27; *Ex parte Melendez*, 9 Cir., 98 F. (2d) 791.

Moreover, it is not apparent that this is one of the "rare cases where exceptional circumstances of peculiar urgency are shown to exist" (*United States ex rel. Kennedy, et al.* v. *Taylor*, 269 U. S. 13, 17), which might possibly justify the issuance of the writ, and we hold there was no abuse of discretion in the denial of it.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 16, 1942. Paul P. O'Brien, Clerk."

VI.

Your petitioner respectfully shows that the United States Circuit Court of Appeals for the Ninth Circuit, in rendering its decision in which it affirmed the decision of the lower Federal Court, on said appeal, made to it as aforesaid, suggested and recommended that the questions of law therein and here involved and raised be presented to and passed upon by the Supreme Court of the United States under a writ of review as hereinafter prayed.

WHEREFORE, your petitioner, J. Frank Hogue, prays that Paul P. O'Brien as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be by this Court required to certify to this Court at a specified time and place a full transcript of the record up to and including said judgment, for review herein, and that thereupon this Court review and annul the same, and that upon said hearing this Court grant your petitioner's petition for a writ of habeas corpus,

and that he be granted his release and freedom from his illegal imprisonment.

Respectfully submitted,

(Signed) J. FRANK HOGUE,
Petitioner.

Sworn and subscribed to before me this day of Feb. 17, 1942.

[SEAL.] MELVIN S. MCKERICKER,
Notary Public in and for the County of Marin, State of California at San Quentin.

My Commission Expires July 9, 1945.